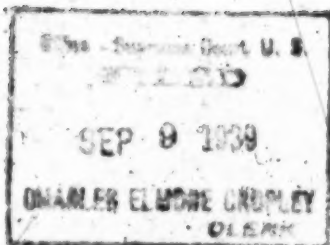


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No. 262

In the Supreme Court of the United States

OCTOBER TERM, 1939

SOUTH CHICAGO COAL & DOCK COMPANY, AN ILLINOIS CORPORATION, AND LONDON GUARANTEE & ACCIDENT COMPANY, LTD., PETITIONERS

v.

HARRY W. BASSETT, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, 10TH COMPENSATION DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION



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OPINIONS BELOW

The District Court did not write an opinion. Its decree appears at R. 71-72. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 84-92) is reported in 104 F. (2d) 522.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit was entered on May 11, 1939 (R. 92). A petition for rehearing was denied on June 6, 1939 (R. 109). The petition for a writ of certiorari was filed on August 4, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the employee here involved was a member of a crew and so not covered by the Longshoremen's and Harbor Workers' Compensation Act.
2. Whether the above question was one upon which the determination of the Deputy Commissioner was conclusive if supported by evidence, or was for the determination of the District Court *de novo*.

STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act (c. 509, 44 Stat. 1424; U. S. C., Tit. 33, § 901 ff.) are set forth in the Appendix, *infra*, pp. 12-13.

STATEMENT

John Schumann was drowned on October 31, 1937, while engaged in his duties as an employee of petitioner, South Chicago Coal & Dock Company,

on a vessel, "Koal Kraft," which at that time was in the navigable waters of the United States (R. 6, 9, 14, 15, 40).

The boat was a lighter, used for fueling steamships and other marine equipment in the Calumet River and Harbor and in the Indiana River and Harbor (R. 13). The boat had a captain, an engineer, a fireman, and three "deck hands" (R. 15). This complement was required by its Certificate of Inspection (R. 65-67; 41-42), so that whenever one of the men failed to show up, he would be replaced by someone picked up at random (R. 42). The activity of the boat was seasonal, lasting about eight months a year (R. 36). The men who worked on it came in as laborers and acquired experience as they went along (R. 19).

Schumann, who had had no previous experience with boats (R. 27), began work on the "Koal Kraft" on October 5, 1937 (R. 18). It was an "on and off" job (R. 26). He had signed no papers or "articles" (R. 18). His working hours, whenever he worked, ranged from eight to twelve hours a day (R. 17), averaging somewhat over ten hours each day (R. 23). He was paid at the rate of sixty cents an hour (R. 23).

His work on the boat is variously described. He handled lines on mooring the boat at the dock and on leaving the dock (R. 16). When the lighter arrived at the ship to be coaled, he threw a heaving line to the deck of that ship (R. 22). While the

boat was discharging the coal, he kept the coal running by prodding it down the chute with a long pole (R. 20, 35, 40). This was his main duty (R. 38-40). He did general deck work (R. 16), such as cleaning up spilled coal (R. 58), helping to scrub the deck (R. 35), and, as an accommodation to the fireman, helping with that work (R. 38). Although a deckhand's work on a boat involved "general labor, keeping it clean, handling the lines, painting or whatever you ask him to do" (R. 18, 40), Schumann had not done any painting or scrubbing, since that work was done in the summer and he did not begin working until October (R. 40). His only act of seamanship was throwing a heaving line (R. 21).

Schumann had no duties while the boat was under way from the time it left the dock to the time when it reached its destination (R. 22, 53). He did not aid in the navigation of the boat (R. 20, 38, 52, 55).

The "Koal Kraft" had no quarters in which anyone could stay (R. 17), nor were any meals available on the boat (R. 53). Schumann never slept on the boat (R. 39). He stayed at home and waited for telephone calls directing him to report to work whenever he was needed (R. 20, 25-26, 39).

On the date of his death the boat was proceeding from its dock at 95th Street on the Calumet River to a steamship about a mile away (R. 53). He was last seen alive a short while after the boat had begun moving (R. 37). His disappearance was reported to the captain when the boat arrived at its destination (R. 50). Later his body was found in the river (R. 50).

Schumann's wife and daughter filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act R. 43). Upon the facts stated above the Deputy Commissioner found that on the date of his death Schumann was an employee of the South Chicago Coal & Dock Company and that on that date, while performing services for his employer as a laborer on the barge "Koal Kraft," he fell from the barge into the river and was drowned (R. 43-44).¹ An award was made (R. 44).

Thereupon, the petitioners filed a bill for injunction in the United States District Court for the Northern District of Illinois, Eastern Division, praying that the compensation order be set aside, and that a finding be made that Schumann was a member of the crew and that the claim was therefore not within the provisions of the Act (R. 2-5).

Upon the hearing before the District Court substantially the same evidence was introduced which had been introduced before the Deputy Commissioner (R. 47-68). The record of the hearings before the Deputy Commissioner (R. 8-42) was included in the record before the District Court (R. 60, 61).

With this record before it, the District Court found as a fact that at the time of his death Schu-

¹ The Deputy Commissioner stated in his finding of fact that when Schumann fell from the barge it was "moored" (R. 43). This is apparently an error, but since there is no dispute that the barge was on navigable waters, it is a harmless error.

mann was a member of the crew of the vessel and therefore not within the coverage of the Act (R. 71). Accordingly it entered a decree permanently enjoining the enforcement of the compensation award (R. 71-72). On appeal, the Circuit Court of Appeals for the Seventh Circuit reversed. It held that the Deputy Commissioner's finding that Schumann was not a member of the crew was conclusive if supported by evidence and could not be reviewed *de novo* by the District Court (R. 87-89) and that the Deputy Commissioner's finding was supported by evidence (R. 89-91). It further held that even if the question were one for the determination of the District Court *de novo*, it would reverse the District Court because the undisputed evidence established that Schumann was not a member of a crew (R. 91-92).

ARGUMENT

1. If Schumann was a member of the crew of the "Koal Kraft," he was not covered by the Longshoremen's and Harbor Workers' Act, being specifically excluded therefrom by Sections 2 and 3 of the Act, *infra*, p. 12. Petitioners contend that Schumann was a member of the crew, and that the holding of the court below to the contrary is in conflict with the decisions in *Ellis v. United States*, 206 U. S. 246; *Maryland Casualty Co. v. Lawson*, 94 F. (2d) 190 (C. C. A. 5th); and *Kibadeaux v. Standard Dredging Co.*, 81 F. (2d) 670 (C. C. A. 5th), certiorari denied, 299 U. S. 549.

Whether an employee is a member of a crew within the excluding provision of the Longshoremen's and Harbor Workers' Act depends in each case upon the particular circumstances of the employment. The employee in this case had not signed any articles (R. 18). He was paid by the hour (R. 23). His main duty was to keep the coal running while the lighter was discharging (R. 38-40). He had no duties while the boat was in motion, from the time it left the dock until it reached the ship to be fueled (R. 22, 53). He had nothing to do with the navigation of the boat (R. 38, 52, 55). The boat had no quarters in which he could stay, nor were any meals available on board (R. 17, 53). He never slept on the boat (R. 39), and worked only when he was ordered by telephone to report for work (R. 20, 25, 26, 29).

The cases cited by petitioners are not in conflict with the holding of the court below that upon these facts the employee was not a member of a crew. In *Maryland Casualty Co. v. Lawson*, the employer was "fed and quartered" aboard the boat, assisted in its navigation, and was "permanently attached" to the boat "as a member of the ship's company" (94 F. (2d) at 192-193). Similarly, in *Kibadeaux v. Standard Dredging Co.*, the employee was "permanently employed on the vessel and quartered there" and was "under duty to aid in navigating her" (81 F. (2d) at 673). *Ellis v. United States* did not deal with the Longshoremen's and Harbor worker's Act at all. The Court there held (206

U. S. 260) that persons employed upon dredges and scows in dredging a harbor were not "laborers or mechanics * * * employed * * * upon any of the public works" of the United States, within the meaning of a statute fixing maximum hours of labor for such laborers and mechanics. In the course of the opinion the Court said that employees upon dredges and scows fell into the category of seamen as defined by an earlier statute—R. S., Sec. 4612. But Congress specifically determined not to use the definition of seamen in R. S., Sec. 4612, to define what employees were excluded from the Longshoremen's and Harbor Workers' Act. See 68 Cong. Rec., 5402-5403.

The decisions cited by petitioners are thus not in conflict with the decision below. On the other hand, that decision below is supported by the decisions in *Diomede v. Lowe*, 87 F. (2d) 296 (C. C. A. 2d), certiorari denied, sub nom. *Moran Brothers Contracting Co., Inc., v. Diomede*, 301 U. S. 682; *Lawson v. Maryland Casualty Co.*, 94 F. (2d) 193 (C. C. A. 5th) (not to be confused with *Maryland Casualty Co. v. Lawson*, *supra*); and *Moore Dry Dock Co. v. Pillsbury*, 100 F. (2d) 245 (C. C. A. 9th.²

² The designation of the statute as "Longshoremen's and Harbor Workers' Compensation Act" draws attention to the fact that there is a distinction between longshoremen, who ordinarily work on and about docks, harbor workers, who work in and about a harbor, and seamen, who are not covered by this Act. The employee in the present case plainly was in the second category. Cf. *Diomede v. Lowe*, *supra*.

2. Petitioners urge also that the question whether the employee was a member of the crew was jurisdictional and that, therefore, the determination of the Deputy Commissioner that he was not and was entitled to the benefits of the Act was reviewable *de novo* by the District Court. In support of this contention petitioners rely upon *Crowell v. Benson*, 285 U. S. 22, and *Maryland Casualty Co. v. Lawson*, 94 F. (2d) 190 (C. C. A. 5th) (Br., pp. 15-19).

In the *Benson* case this Court held that while a determination of a deputy commissioner with respect to an ordinary question of fact arising under the Act was conclusive if supported by evidence, that the district court was entitled to determine *de novo* the so-called fundamental or "jurisdictional" facts, the existence of which is a condition precedent to the constitutional application of the statute. These "jurisdictional" requirements were enumerated as: (a) That the injury occur upon the navigable waters of the United States, and (b) that the relation of master and servant exist (285 U. S. at pp. 37-38, 54-55, 63-68). No other "jurisdictional" limitation upon the finality of a deputy commissioner's findings (if supported by evidence) was suggested.^{*} And the Court recognized that it

^{*} The Court said (pp. 64-65): "The argument is made that there are other facts besides the locality of the injury and the fact of employment which condition the action of the deputy commissioner. That contention in any aspect could not avail to change the result in the instant case. But we think that there is a clear distinction between cases where the locality of the injury takes the case out of the admiralty and maritime jurisdiction, or where the fact of employment being absent there is lacking under this statute any basis for

was essential to the prompt and inexpensive procedure contemplated by the Act that all factual determinations by deputy commissioners other than those dealing with the enumerated jurisdictional facts be conclusive if supported by evidence (285 U. S. at 46, 47). Thus there is no conflict between the decision below and *Crowell v. Benson*.

In the *Maryland Casualty* case the Circuit Court of Appeals for the Fifth Circuit stated, without discussion, that whether an employee was a "member of the crew" was a jurisdictional question on which the finding of the deputy commissioner was not conclusive. Since it does not appear that the question was contested or carefully considered in the *Maryland Casualty* case, it is submitted that no conflict warranting certiorari exists, especially since the court below thoroughly reexamined the evidence and reached the conclusion that, even if a trial *de novo* was proper, the finding of the District Court was erroneous, and that of the deputy commissioner correct.

the imposition of liability without fault, and those cases which fall within the admiralty and maritime jurisdiction and where the relation of master and servant in maritime employment exists. It is in the latter field that * * * the determination of the facts relating to the circumstances of the injuries received, as well as their nature and consequences, may appropriately be subjected to the scheme of administration for which the Act provides."

The constitutional problems discussed in the *Benson* case are plainly absent in this case.

CONCLUSION

The decision of the court below is correct. No conflict warranting certiorari is presented. We respectfully submit that the petition should be denied.

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✓ PAUL A. SWEENEY,
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SEPTEMBER 1939.

APPENDIX

The relevant sections of the Longshoremen's and Harbor Workers' Compensation Act (C. 509, 44 Stat. 1424, 1425, 1426, 1435, 1436) are:

SEC. 2. When used in this Act—

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the wilful

intention of the employee to injure or kill himself or another.

SEC. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

SEC. 20. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.